Office Supreme Court, U.S.
FILED
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

No. 250

SUN OIL COMPANY, *Petitioner*,

v.

FEDERAL POWER COMMISSION, *Respondent*.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

JOHN A. WARD, III
1608 Walnut Street
Philadelphia 3, Pennsylvania

CHARLES F. HEIDRICK
J. COLBERT PEURIFOY
P. O. Box 2880
Dallas, Texas

ROBERT E. MAY
OMAR L. CROOK
May, Shannon and Morley
1700 K Street, N. W.
Washington 6, D. C.

Attorneys for Petitioner

MARTIN A. ROW
P. O. Box 2880
Dallas, Texas

Of Counsel

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

INDEX

	Page
Opinion Below	2
Jurisdiction	2
Question Presented	2
Statutes Involved	3
Statement of the Case	3
Reasons for Granting the Writ	7
I. The Order Under Review, Unless Set Aside, Renders the Flexible Pricing Provision, Applicable to the Sale Authorized in Such Order, Inoperative and of No Effect at Law	8
II. Respondent's Order of September 21, 1961 Is Reviewable Under Section 19(b) of the Natural Gas Act	10
III. This Petition Involves Important Legal and Other Considerations	12
Conclusion	13

TABLE OF CONTENTS OF APPENDICES

Appendix A:	
Opinion in Court Below	1a
Letter Order of the Federal Power Commission dated September 21, 1961	6a
Judgment in the Court Below	8a
Order in Court Below	9a
Appendix B:	
Excerpts from the Natural Gas Act	10a

CASES: Page

Algonquin Gas Transmission Co. v. Federal Power Commission, 201 F. 2d 334 10
Cities Service Gas Company v. Federal Power Commission, 255 F. 2d 860, cert. denied sub. nom. Magnolia Petroleum Company v. Cities Service Gas Company, 358 U.S. 837 11
Columbia Broadcasting System v. United States, 316 U.S. 407 10
Isbrandtsen Co. v. United States, 211 F. 2d 51, cert. denied sub. nom. Japan-Atlantic and Gulf Conference v. United States 10-11
J. M. Huber Corp. v. Federal Power Corporation, 294 F. 2d 568 10
Keeler v. Commissioner of Internal Revenue, 180 F. 2d 707 11
Phillips Petroleum Company v. Federal Power Commission, 227 F. 2d 470 11
Sohio Petroleum Co. v. Federal Power Commission, 298 F. 2d 465 (10th Cir. 1961) 10
Sun Oil Company v. Federal Power Commission, 266 F. 2d 222, affirmed 364 U.S. 170 11
Sunray Mid-Continent Oil Co. v. Federal Power Commission, 270 F. 2d 404 10
Texaco, Inc. v. Federal Power Commission, 290 F. 2d 149 10
The Pure Oil Company v. Federal Power Commission, 292 F. 2d 350 10
United Gas Pipe Line Co. v. Mobile Gas Service Corp., 350 U.S. 332 13

STATUTES:

Natural Gas Act (15 U.S.C. § 717 et seq.):

Section 7 3
Section 19 3
Section 19(b) 2, 10, 13

Regulations Under the Natural Gas Act (18 C.F.R., Chap. I):

Section 154.93 ..... 2, 6, 7, 8, 9, 11, 12

28 U.S.C. § 1254(1) 2

IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

No.

SUN OIL COMPANY, *Petitioner*,

v.

FEDERAL POWER COMMISSION, *Respondent*.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioner, Sun Oil Company, prays that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Fifth Circuit entered in Cause No. 19424 on April 25, 1962. The judgment granted the Federal Power Commission's (sometimes called "Respondent") motion to dismiss and dismissed the petition to review.

OPINION BELOW

The opinion of the Court of Appeals is not yet reported and is printed in Appendix A, pp. 1a-6a; R. 74-79.[1] The order of the Federal Power Commission, in the form of a letter dated September 21, 1961 (R. 26-27) of which review was sought in the court below, is not yet reported, and is printed in Appendix A, pp 6a-8a. The Commission's order dated November 22, 1961 denying rehearing (R. 28) is not yet reported.

JURISDICTION

The judgment of the Court of Appeals was entered April 25, 1962 (Appendix A, p. 8a; R. 80). Rehearing was denied May 29, 1962 (Appendix A, p. 9a; R. 85). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) and section 19(b) of the Natural Gas Act.

QUESTION PRESENTED

Is Respondent's order issuing a temporary certificate containing a statement which declares inoperative and of no effect at law any rate change provision in a listed rate filing executed on or after April 3, 1961, with the exception of the provisions permitted by section 154.93 of the Commission's Regulations, a reviewable order under section 19(b) of the Natural Gas Act, when Petitioner's listed rate filing with respect to the sale was executed after April 3, 1961 and contained proscribed rate change provisions which were applicable to the sale?

---

[1] Record references are to the transcript of record prepared by the Clerk of the Court of Appeals. A certificate of record in lieu of record was filed by Respondent at the time it filed its motion to dismiss (R. 57-59). The court acted on such motion and the record was not printed. The statement of the proceeding herein is summarized from the pleadings before the court below which are set forth in the transcript of record as prepared by the Clerk of the court.

STATUTES INVOLVED

This case involves section 7 and 19 of the Natural Gas Act, pertinent provisions of which are printed in Appendix B, pp. 10a-14a.

STATEMENT OF THE CASE

The letter order of September 21, 1961, which the court below determined was not a reviewable order, was issued in connection with Petitioner's application to amend an existing certificate of public convenience and necessity to authorize the sale of natural gas from additional acreage not covered by the original certificates and nine previous amendments thereto.

Although not involved in this proceeding, the Commission by its Opinion No. 323 and accompanying order (22 F.P.C. 391) issued August 10, 1959, as amended, granted Petitioner a certificate in Docket No. G-14791 to sell gas to Transwestern Pipeline Company (Transwestern) with a price condition. Thereafter, Petitioner filed its contract dated July 10, 1958 for the sale of gas to Transwestern as its rate schedule applicable to the sale authorized by the foregoing certificate issued in Docket No. G-14791.

A favored-nation clause and a price redetermination clause at four-year intervals were included as parts of the pricing provisions of the contract[2] dated July

[2] These clauses, which Petitioner believes Respondent's order issued September 21, 1961, if valid, renders inoperative and of no effect at law, insofar as they apply to the sale authorized by that order, were reproduced by Petitioner and filed in the court below as an appendix to Petitioner's answer to Respondent's motion to dismiss (R. 70-72). The clauses are a part of the first item listed in the certificate of the record in lieu of record (R. 58).

10, 1958 with Transwestern and filed as Petitioner's rate schedule. In addition, the contract authorized Petitioner, at its sole option and by unilateral notice, to transfer certain undeveloped lands and leases listed in the contract, after the discovery of natural gas thereon, to the list of producing leaseholds and lands contained in the contract and thereby to commit the gas to be produced from lands and leaseholds so transferred to the terms of the sale in the contract of July 10, 1958 including the pricing provisions thereof.

On July 3, 1961 Petitioner gave Transwestern unilateral notice of its election to make additional acreage subject to the July 10, 1958 contract. Petitioner applied on July 12, 1961 for an amendment to its outstanding certificate to make the sale covered by the unilateral notice of July 3, 1961 and, pending action thereon, for temporary authority to make the sale. On the same date Petitioner also filed the unilateral notice to Transwestern as a supplement to Petitioner's rate schedule for its sale to Transwestern.

On September 21, 1961 the Respondent issued the letter order involved in this proceeding. It granted Petitioner temporary authorization to make the sale. Respondent also accepted and listed the unilateral notice to Transwestern dated July 3, 1961 as a supplement to Petitioner's effective rate schedule (Appendix A, pp. 6a-8a). As already pointed out, the notice to Transwestern made applicable to the sale all terms of the contract dated July 10, 1958 including the favored-nation and price-redetermination at four-year interval clauses. The letter order dated September 21, 1961 contained the following statement:

> "Further, in the event that any document comprising the listed rate filing was executed on or

after April 3, 1961, and contains provisions, either therein or by adoption of the terms and provisions of other agreements, for a change in rate other than those permitted by Section 154.93 of the Commission's Regulations, such rate change provisions shall be inoperative and of no effect at law and any tendered rate change under such provisions will be rejected."
(Appendix A, p. 7a; R. 26)

The proviso to section 154.93 to which the above statement refers was adopted by Order No. 232 issued March 3, 1961 as amended by Order No. 232A issued March 31, 1961. It provides as follows:

"*Provided*, That in contracts executed on or after April 3, 1961, for the sale or transportation of natural gas subject to the jurisdiction of the Commission, any provision for a change of price other than the following provisions shall be inoperative and of no effect at law; the permissible provisions for a change in price are:

(1) provisions that change a price in order to reimburse the seller for all or any part of the changes in production, severance, or gathering taxes levied upon the seller;

(2) provisions that change a price to a specific amount at a definite date; and

(3) provisions that, once in five-year contract periods during which there is no provision for a change in price to a specific amount [paragraph (2)], change a price at a definite date by a price-redetermination based upon and not higher than a producer rate or producer rates which are subject to the jurisdiction of the Commission, are not in issue in suspension or certificate proceedings, and are in the area of the price in question" (R. 31).

On October 23, 1961 Petitioner filed a timely application for rehearing of the order issued September 21, 1961, such application being limited to the statement quoted above. By a letter order dated November 22, 1961 Respondent dismissed the application stating that Petitioner had not shown itself aggrieved and that Petitioner had not tendered a rate change proposing to make effective the flexible pricing provisions contained in the contract of July 10, 1958 (R. 28).

On January 12, 1962 Petitioner filed a petition to review the order issued September 21, 1961 limited to the statement quoted above (R. 2-31). Such proceeding was assigned Case No. 19424 by the court below. Petitioner also filed with the court on January 22, 1962 a motion requesting that the review proceedings in Case No. 19424 be consolidated for hearing with Case No. 19001 in which Petitioner was seeking review of the proviso to section 154.93 of the Commission's Regulations (R. 32-37). The court, by an order of February 15, 1962 denied the motion to consolidate. The oral argument in this proceeding was set for the same date as the hearing on the merits in Case No. 19001 (R. 41). On March 27, 1962 the court heard argument on Respondent's motion to dismiss (R. 73).

On April 25, 1962 the court issued its opinion (Appendix A, pp. 1a-6a; R. 74-79) and judgment (Appendix A, p. 8a; R. 80) in this proceeding granting Respondent's motion to dismiss and dismissing the petition for review. On the same date, the court below dismissed the petition to review in Cause No. 19001.

On May 16, 1962 Petitioner filed a petition for rehearing in this proceeding (R. 81-84). The court, by an order dated May 29, 1962 denied such petition, (Ap-

pendix A, p. 9a; R. 85). Upon motion filed June 8, 1962 (R. 86-89), the court, by order entered June 14, 1962 stayed the issuance of the mandate for a period of thirty days, such stay to be continued in force until final disposition by the Supreme Court, provided that within thirty days from the date of the June 14, 1962 order there shall be filed with the Clerk of the Court of Appeals a certificate that a certiorari petition and the record have been filed with the United States Supreme Court (R. 90).

REASONS FOR GRANTING THE WRIT

Concurrently with the filing of this petition, Petitioner is filing a petition for a writ of certiorari to the Fifth Circuit (Case No. 19001) for the purpose of determining the reviewability of the order promulgating the proviso to section 154.93 of the Commission's regulations quoted above (ante p. 5). The court below held such order to be nonreviewable in Case No. 19001.

In Petitioner's view, the instant case involves a specific application of the proviso to section 154.93 as broadened by the Respondent's order issued September 21, 1961. Respondent contended below and the court found that the statement in the order of September 21, 1961 of which Petitioner unsuccessfully sought review is only "'* * * a means of calling the regulation to the attention of the applicant'" (Appendix A, p. 5a; R. 78). Petitioner believes the court below erred in this holding, as hereinafter discussed.

I. The Order Under Review, Unless Set Aside, Renders the Flexible Pricing Provision, Applicable to the Sale Authorized in Such Order, Inoperative and of No Effect at Law

The statement in the order issued September 21, 1961, quoted above (ante p. 7), to which Petitioner objected, sets forth in definitive language that in the event any document executed after April 3, 1961, comprising the listed rate filing (and Petitioner's unilateral notice of July 3, 1961 was the only listed rate filing), contains by adoption provisions for changing rates other than those permitted by section 154.93, such rate change provisions shall be inoperative and of no effect at law. In addition, it is stated in clear language that any tendered rate changes under the provisions of the listed rate filing executed on or after April 3, 1961 (which contain proscribed flexible pricing provisions) will be rejected. These references to the listed rate filing make the statement applicable only to Petitioner's rate filing.

There can be no question that Petitioner's July 3, 1961 unilateral notice makes the flexible pricing provisions set forth in the contract of July 10, 1958 applicable to the sale authorized by the order issued September 21, 1961. These flexible pricing provisions, consisting of a favored-nation clause and a price-redetermination clause at four-year intervals, clearly are not the type of rate change provisions permitted by section 154.93 of the Commission's Regulations. Consequently, the statement in the September 21, 1961 order is only applicable to Petitioner's rate filing and it declares the proscribed flexible price provisions adopted by such filing to be inoperative and of no effect at law.

The apparent object of the proviso to section 154.93 of the Respondent's Regulations is to render inopera-

tive and of no effect at law any pricing provision not permitted by the proviso. The court's conclusion that the statement in the order issued September 21, 1961 is intended only to bring the existence of the proviso to Petitioner's attention appears to be unreasonable and contrary to the object of the Respondent in adopting the rule.

It is apparent from an analysis of the language of the statement in the order of September 21, 1961 and the proviso to section 154.93 of the Regulations themselves that the statement is broader than the proviso in two material respects; namely (1) the proviso relates only to contracts executed on or after April 3, 1961—the statement relates to any *document* executed on or after April 3, 1961, and (2) the statement adds a further provision that rate filings based on proscribed flexible pricing provisions will be rejected. Had the statement related to "any contract" executed on or after April 3, 1961 it would have no applicability to Petitioner because the applicable contract of Petitioner was executed on July 10, 1958. The statement could not be a mere notice of the existence of the regulation adopted by the proviso because, as shown above, the statement was materially different than the proviso. In addition the statement contains references to any document executed after April 3, 1961 comprising the listed rate filing. This makes the statement only applicable to Petitioner's unilateral notice of July 3, 1961.

Under the foregoing analysis, Petitioner submits that the court's adoption of the Respondent's construction of the statement is in error and that its ruling dismissing petitioner's petition to review on the ground that the order was not reviewable is also in error. The language of the statement in the September 21, 1961 order clearly signifies that Petitioner shall not exercise

any of the rights accorded it by the flexible pricing provisions adopted by its listed rate filing dated July 3, 1961.

II. Respondent's Order of September 21, 1961 Is Reviewable Under Section 19(b) of the Natural Gas Act

Contrary to the holding below that the order of which Petitioner sought review is merely a step in the administrative process and is interlocutory (Appendix A, p. 5a; R. 78), the order was final in that it granted Petitioner temporary authorization to make the sale of additional gas to Transwestern. Thus, there can be no question that the order was a final order within the meaning of section 19(b) of the Natural Gas Act.[3]

Contrary to the court's finding that the language in the letter order of which Petitioner complains has no coercive effect (Appendix A, 5a; R. 78), the analysis in the preceding section clearly shows that the statement in the order renders inoperative and of no effect at law the flexible pricing provisions as adopted by the listed rate filing dated July 3, 1961. Such action, in holding the flexible pricing clauses in Petitioner's rate filing for naught, clearly "aggrieves" Petitioner by fixing its legal relationship with its purchasers and is a reviewable order. *Isbrandtsen Co.* v. *United States,* 211 F. 2d 51 at 55 (relying upon *Columbia Broadcasting System* v. *United States,* 316 U.S. 407, 425 (1942)),

---

[3] *Algonquin Gas Transmission Co.* v. *Federal Power Commission,* 201 F. 2d 334, 337-8 (1st Cir. 1953); *Texaco, Inc.* v. *Federal Power Commission,* 290 F. 2d 149, 157 (5th Cir. 1961); *The Pure Oil Company* v. *Federal Power Commission,* 292 F. 2d 350 (7th Cir. 1961); *Sunray Mid-Continent Oil Co.* v. *Federal Power Commission,* 270 F. 2d 404 (10th Cir. 1959); *J. M. Huber Corp.* v. *Federal Power Commission,* 294 F. 2d 568 (3rd Cir. 1961); *Sohio Petroleum Co.* v. *Federal Power Commission,* 298 F. 2d 465 (10th Cir. 1961).

cert. denied sub. nom. Japan-Atlantic and Gulf Conference v. *United States*, 347 U.S. 990 (1954).

Other courts, such as the United States Court of Appeals for the Tenth Circuit in *Phillips Petroleum Company* v. *F.P.C.*, 227 F. 2d 470 (1955), have also ruled that,

> "* * * reviewability extends to an order issued by the Commission which finally determines the legal rights of the parties with respect to matters within the scope of review * * *". (227 F. 2d at 474).

And that court held in an earlier decision that:

> "* * * The rule that only a party aggrieved by a decision may appeal is recognized, but to be aggrieved it is not necessary that there be an actual pecuniary loss. The proper test is whether the decision invades the legal rights of a person or operates adversely on his property rights and interests" *Keeler* v. *Commissioner of Internal Revenue*, 180 F. 2d 707 at 709 (10th Cir. 1950) (Footnote omitted).[4]

Even if it were considered that the statement in the order issued September 21, 1961 is in the nature of a rule or regulation, it would still be reviewable for the reasons discussed in the concurrently filed petition for certiorari with respect to the proviso to section 154.93 of the Commission's Regulations. However, as pointed out in the preceding section, the statement, because of its own terms, could only have applicability to Petitioner's rate filing and would not be a rule of general applicability.

---

[4] See also *Cities Service Gas Company* v. *Federal Power Commission*, 255 F. 2d 860 (10th Cir. 1958), *cert. denied sub. nom. Magnolia Petroleum Company* v. *Cities Service Gas Company*, 358 U.S. 837 (1958); *Sun Oil Company* v. *Federal Power Commission*, 266 F. 2d 222 (5th Cir. 1959), *affirmed* 364 U.S. 170 (1960).

III. This Petition Involves Important Legal and Other Considerations

In the petition for a writ of certiorari being concurrently filed with this Court in respect to the proviso to section 154.93 of the Respondent's Regulations, Petitioner showed how the limitations imposed by such proviso are contrary to the intent of Congress to preserve private contractual arrangements needed to accomplish some of the purposes considered desirable when Congress enacted the Natural Gas Act. Therefore it is important that the proviso be subjected to judicial review. The reasons for granting certiorari in that case are also reasons for granting the petition in this case.

This petition together with the concurrently filed petition illustrates the difficulties in obtaining court review of regulations and orders which in Petitioner's view have a far-reaching and adverse effect on the initial rate-making and rate-changing powers of independent producers. These powers have remained undefined and unaffected by the Act under this Court's decision in *United Gas Pipe Line Co.* v. *Mobile Gas Service Corp.*, 350 U.S. 332 (1956). In the instant case, by an order which Petitioner believes is intended to render inoperative and of no effect at law flexible pricing provisions in an existing contract, Petitioner, until the present time, has been denied court review to test the correctness of the order.

Petitioner believes that although the issues in this proceeding relate to one contract, the factual situation is an important one when considered in connection with the proviso to section 154.93 of the Regulations as adopted by Order No. 232 issued March 3, 1961, as amended by Order No. 232A issued March 31, 1961.

CONCLUSION

Respondent's order issued September 21, 1961 renders inoperative and of no effect at law the flexible pricing provisions adopted by Petitioner's rate filing dated July 3, 1961, adversely affects Petitioner's contract rights and is a reviewable order under section 19(b) of the Natural Gas Act. In Petitioner's view, the order, unless reviewed and set aside, will have a far-reaching and adverse effect on the use of private contractual arrangements by natural gas companies as intended by Congress and will be contrary to the regulatory scheme of the Natural Gas Act.

Accordingly, pursuant to section 19(b) of the Natural Gas Act and paragraph 1(b) of Rule 19 of the Rules of this Court, Petitioner prays that a writ of certiorari be granted.

Respectfully submitted,

JOHN A. WARD, III
1608 Walnut Street
Philadelphia 3, Pennsylvania

CHARLES F. HEIDRICK
J. COLBERT PEURIFOY
P. O. Box 2880
Dallas, Texas

ROBERT E. MAY
OMAR L. CROOK
May, Shannon and Morley
1700 K Street, N. W.
Washington 6, D. C.

Attorneys for Petitioner

By OMAR L. CROOK

MARTIN A. ROW
P. O. Box 2880
Dallas, Texas
Of Counsel

Certificate of Service

I certify that the foregoing Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit was served upon Respondent, the Federal Power Commission, by mailing a copy thereof, postage prepaid, to each of the following attorneys for Respondent on the 14th day of July, 1962:

Archibald Cox, Solicitor General
Department of Justice
Washington 25, D. C.

Richard Solomon, General Counsel
Howard E. Wahrenbrock, Solicitor
Peter H. Schiff, Esquire
Federal Power Commission
441 G Street, N. W.
Washington 25, D. C.

OMAR L. CROOK
Attorney for Petitioner,
Sun Oil Company